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CHARLES ELMORE CROPLEY

SUPREME COURT OF THE UNITED STATES.

OCTOBER TERM, 1943.

FRED GABLE, CHARLIE HUTTER,
Petitioners,
vs.
STATE OF ALABAMA.

No. 749

PETITION FOR WRIT OF CERTIORARI TO THE SUPREME COURT OF ALABAMA, AND BRIEF IN SUPPORT THEREOF.

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RODERICK BEDDOW,
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SUPREME COURT OF THE UNITED STATES.

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FRED GABLE, CHARLIE HUTTER,
Petitioners,
vs.
STATE OF ALABAMA.
No.....

SEPARATE AND SEVERAL PETITION FOR WRIT OF CERTIORARI.

The petitioners, Fred Gable and Charlie Hutter, separately and severally respectfully show to this Honorable Court:

A.

STATEMENT OF MATTER INVOLVED.

1. Each of your petitioners are citizens of the United States. They were each indicted along with Glen Towns and William Pritchett by the grand jury of Baldwin County, State of Alabama, Circuit Court in 1941. The indictment contained two counts, each count charging a capital felony, which might in the discretion of the jury be punished by death in the electric chair (Rec. p. 1).

There was conflict in the evidence as to whether robbery in fact was committed. Each of these defendants was

denied bail pending his trial upon the indictment and was lodged in the County Jail of Baldwin County. The trial began on December 2, 1941 (Rec. p. 3), and continued through December 5, 1941 (Rec. p. 74).

After the Court had completed his instructions in chief to the jury and while the jury was deliberating, each of these defendants was confined in the County Jail of Baldwin County. While they were so confined and on the 4th day of December, 1941, the jury was returned to the court room at about 2 o'clock in the afternoon. They had at that time been deliberating since the 3rd day of December, 1941. While the defendants remained in the County Jail absent from the court room, the Court proceeded in their absence as follows:

> "By the Court: Gentlemen, is there any question of law that is bothering the jury in any way? If so, I would be glad to assist you in any way I can.
>
> Juror: Your Honor, Judge, would it be all right for us to go ahead and reach a verdict on two, and then on one if we couldn't reach a verdict could we call a mistrial on that?
>
> The Court: You could; yes, sir.
>
> Juror: On the other hand, if we reach a verdict on one could we call a mistrial on the other two?
>
> The Court: Yes, sir. Anything else?
>
> Juror: No, sir.
>
> The Court: All right, you may retire" (Rec. p. 74).

To this conduct of the Court in the absence of the defendants, counsel for the defendants noted an exception (Rec. p. 74).

The verdict of the jury and judgment of the court was adverse to each of these defendants and the punishment of each defendant was fixed at ten years in the Penitentiary of the State of Alabama (Rec. pp. 105-106-99).

2. Appeal was duly perfected to the Court of Appeals of the State of Alabama, the certificate of appeal appearing as the first unnumbered page of the record.

Judgment was rendered by the Court of Appeals on June 15, 1943, affirming the judgment of the Circuit Court of Baldwin County (Rec. p. 108). The opinion of the Court of Appeals appears in the record at page 109 et seq.

Application to the Court of Appeals for a rehearing was duly and timely filed on June 29, 1943, by each petitioner (Rec. pp. 118, 119). This application for a rehearing was overruled by the Court of Appeals on October 5, 1943 (Rec. p. 119).

Petition to the Supreme Court of Alabama for writ of certiorari to the Court of Appeals was filed by each petitioner on the 19th day of October, 1943 (Rec. pp. 120-123, incl.).

The petition for writ of certiorari was by the Supreme Court of Alabama denied on Thursday, October 28, 1943 (Rec. p. 124), the opinion of the Supreme Court appearing on record page 125.

The petitioners filed application to the Supreme Court of Alabama for a rehearing on November 11, 1943, which application for a rehearing was denied on Thursday, December 2, 1943 (Rec. p. 127).

Notice of intention to apply to the Supreme Court of the United States for review and application for stay of execution was filed in the Supreme Court of Alabama on Friday, December 3, 1943, and was by the Court granted and execution of sentence stayed pending final disposition of these causes by the Supreme Court of the United States upon application for writ of certiorari timely filed by petitioners (Rec. p. 131).

B.

STATEMENT OF JURISDICTION.

1. This Court has jurisdiction to grant the relief prayed because this is a case wherein there is drawn into question the validity of trial procedure in a state court under the Constitution of the United States and particularly the 14th Amendment thereto, during a part of the proceedings of which trial, the defendant, being charged with a felony punishable by death, was detained in the county jail without bail and was absent from the court room during a period of time when the Court was proceeding with the trial by giving certain instructions to the jury. The decision of the highest court of the State of Alabama to which this defendant could appeal as a matter of right being adverse to his contention that a criminal trial for a capital offense conducted for any period of time, however brief, while the defendant is detained by the Sheriff in the county jail is a violation of the guarantee contained in the 14th Amendment that the defendant shall not be deprived of his life, liberty, or property without due process of law.

2. The Act of Congress of February 13, 1935, Section 247B, 28 U. S. C. A., Section 344, page 205, authorizes review by the Supreme Court of the United States by writ of certiorari

> "where any title, right, privilege or immunity is specially set up or claimed by either party under the Constitution"

in that each of these petitioners claim the right to be present during each and every moment from the beginning of their trial upon a capital felony until the trial is ended by the entry of a final judgment and claim that this right was denied to them when the Court instructed the jury during their involuntary absence and claim that this right

to be present is guaranteed to them by the due process clause contained in the 14th Amendment to the Federal Constitution.

3. The judgment which this petitioner prays this Court to review was rendered by the Court of Appeals of Alabama on June 15, 1943, affirming the judgment of the Circuit Court of Baldwin County (Rec. p. 108). The opinion of the Court of Appeals appears in the record at page 109 et seq.

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4. The constitutional questions here raised are serious and not frivolous. They involve the right of a defendant charged with a capital felony to be present at every stage of his trial.

And the purpose of the petitioner is to show that it is a denial of due process of law to conduct a trial in a capital case without strict observance of and in violation of this fundamental right, and it is the further purpose of the petitioner to show that there was not a scintilla of evidence in the record upon which the Court of Appeals could base a finding that this petitioner, through his attorney, had waived his right to be present at every stage of the trial including instructions to the jury or had by his failure or had by any conduct of himself or his attorney estopped himself from claiming or asserting his objection thereto.

C.

THE QUESTIONS PRESENTED.

1. (a) The Court of Appeals of Alabama has by its decision affirmed a judgment of conviction in a capital case rendered as the product of a trial in which this petitioner was denied the benefit of due process of law in that said trial was not conducted according to the due course of regular procedure provided by law in the State of Alabama, the defendant being involuntarily absent at a time when the Court was instructing the jury while they were deliberating upon his fate.

A copy of the entire record in this case, certified to be correct by the Clerk of the Court of Appeals of the State of Alabama and the Clerk of the Supreme Court of the State of Alabama is hereby furnished, attached to, and made a part of this application in compliance with Rule 38, Paragraph 1, of the Rules of this Court.

(b) The Court of Appeals of Alabama has decided a federal question of substance not heretofore determined by this Court, or has decided it in a way not in accord with the applicable decisions of this Court.

(c) The Court of Appeals, by its decision in this case, has denied to this petitioner a right guaranteed by the Federal Constitution, namely, the right not to be deprived of his life, liberty or property except upon a trial conducted in accordance with the principles of due process of law pursuant to the guarantees contained in the Fourteenth Amendment to the Federal Constitution.

(d) And each of your petitioners says that said petitioner is not guilty as charged in said indictment; that he verily believes that but for the violation of his constitutional rights, privileges and immunities as hereinbefore set forth, the result of the trial in the court below would have been favorable to him and that the verdict as rendered against said petitioner is the product of a trial wherein his rights were prejudiced by the erroneous conduct of the trial as hereinbefore set forth in violation of his rights as a citizen of the United States, guaranteed to him by the aforementioned provisions of the Constitution of the United States.

D.

PRAYER FOR THE WRIT.

Wherefore each of your petitioners pray separately and severally that a separate and several writ of certiorari be issued out of and under the seal of this Honorable Court directed to the Court of Appeals of Alabama commanding that Court to certify and send to this Court for a review and determination on a day certain to be therein named, a full and complete transcript of the record and all proceedings in the case numbered and titled Docket No. 1, Division 442, Fred Gable and Charlie Hutter v. State of Ala-

bama, and ex parte Fred Gable and Charlie Hutter, and that the judgment of the Court of Appeals of Alabama may be reviewed by this Honorable Court and that your petitioners may have such other and further relief in the premises as unto this Honorable Court may seem meet and just; and your petitioners will ever pray.

FRED GABLE,

By G. ERNEST JONES,
Counsel for Petitioner.

CHARLIE HUTTER,

By G. ERNEST JONES,
Counsel for Petitioner.

RODERICK BEDDOW,
Of Counsel for Petitioners.